IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.12.2007

CORAM:

THE HON'BLE MR.JUSTICE K.MOHAN RAM

Criminal Original Petition No.1208 of 2007

Mohammed Ashan .. Petitioner

vs.

The Senior Intelligence officer,
Directorate of Revenue Intelligence
Chennai.-17. .. Respondent

Prayer : Criminal Original petition filed under Section 482 Cr.P.C. praying for the relief stated therein.

For petitioner : Mr.B.Kumar, Senior Counsel
for Mr.R.Loganathan
For respondent : Mr.N.P.Kumar,
Special Public Prosecutor.

O R D E R

This Criminal Original Petition has been filed praying to call for the records connected to C.C.No.533 of 1995 on the file of the Special Judge for NDPS Cases, Chennai and quash the same as far as the petitioner is concerned.

2. The brief facts that are necessary for the disposal of the above petition are set out below:-

On 8.7.1993, the Officers of DRI seized a suit case from the first accused, viz., Mahesh Deepchand Rathod, who was accompanied by A.2 by name Sanjay Kumavath; the suit case was alleged to be containing Narcotic drugs of 1 kg. of heroin, which was alleged to be supplied by the petitioner herein. A complaint was filed in 1993, in which the petitioner was shown as A.3, but no summons were served on him; the case was split up as against the petitioner and the trial was conducted only in respect of Mahesh Deepchand Rathod (A1), Abdul Rasheed (A4) and Seeni Syed Ahamed (A8).

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3. The Special Court for NDPS cases, Chennai took up the split up case for trial and renumbered the same as C.C.No.4/94 (arising out of F.No.VIII/48/21/93-DRI). At the conclusion of trial, all the aforesaid accused were acquitted for various reasons and they were acquitted of all the charges, including the charge of conspiracy, by judgment dated 7.4.1997. According to the petitioner, the judgment of acquittal has become final, as no appeal came to be filed. While so, the petitioner was arrested in connection with a different case and at present, he is confined in prison at Karnataka. According to the petitioner, in connection with the seizure of 1 kg of heroin from Mahesh Deepchand Rathod (A1), the petitioner was not summoned, nor any statement recorded from him and no incriminating documents were recovered while searching his house at Mandsur, Mandya Pradesh; the case against the petitioner rests solely on the basis of a retracted statement of the said Mahesh Deepchand Rathod (A1); contending that the statement of the co-accused Mahesh Deepchand Rathod (A1) cannot be brought on record as it is barred under Section 30 of the Indian Evidence Act and contending further that excepting the above said statement of the co-accused, there is no other material to frame charges against the petitioner, the petitioner has filed this petition for quashing all further proceedings in C.C.No.533 of 1995 on the file of the Special Judge for NDPS Cases, Chennai.

4. The respondent has filed a counter statement wherein the facts of the case are narrated and the acquittal of A1, A4 and A8 by judgment dated 7.4.1997 rendered in C.C.No.4 of 1994 on the file of the Special Judge for NDPS Cases, Chennai, is admitted. The only objection taken by the respondent against entertaining the above criminal original petition is that, as the case is pending before the Special Court, the remedy for the petitioner lies only before the Special Court and without exhausting such a remedy, the petition filed before this Court cannot be entertained.

5. Heard the learned counsel on either side.

6. Mr.B.Kumar, learned Senior Counsel appearing for the petitioner submitted that the only material available as against the petitioner was the retracted confession statement of Mahesh Deepchand Rathod (A1) and admittedly, the case was split up and the said A1 and other two accused as aforesaid, were tried separately in C.C.No.4 of 1994 and the petitioner herein was the co-accused, who was not jointly tried along with them. Therefore, the confession statement recorded from A.1 could not be used as against the petitioner in the light of the provisions contained in Section 30 of the Indian Evidence Act.

7. The learned Senior Counsel further submitted that excepting the above said retracted confession statement of A.1, there is no other material available on record as against the petitioner and as such, there is absolutely no material to frame charges as against the petitioner. According to the learned Senior Counsel, admittedly,

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charges have not been framed against the petitioner. Therefore, any further continuance of the proceedings as against the petitioner will amount to abuse of process of the Court and the petitioner need not undergo the ordeal of facing a trial when admittedly there is no material even to frame a charge.

8. In support of the above said contentions, the learned Senior Counsel relied on a decision of the Apex Court reported in Suresh Budharmal Kalani v. State of Maharashtra (AIR 1998 SC 3258). In the said decision, in para.6, the Apex Court has observed as under:-

> "Thus said, we may turn our attention to the confession made by Dr.Bansal and Jayawant Suryarao. Under Section 30 of the Evidence Act a confession of an accused is relevant and admissible against a co-accused if both are jointly facing trial for the same offence. Since, admittedly, Dr.Bansal has been discharged from the case and would not be facing trial with Kalani his confession cannot be used against Kalani. The impugned order shows that the Designated Court was fully aware of the above legal position but, surprisingly enough, it still decided to rely upon the confession the specious ground that the prosecution was not in any way precluded from examining Dr.Bansal as a witness in the trial for establishing the facts disclosed in his confession. This again, was a perverse approach of the Designated Court while dealing with the question of framing charges. At that stage, the Court is required to confine its attention to only those materials collected during investigation which can be legally translated into evidence and not upon further evidence (dehors those materials) that the prosecution may, adduce in the trial, which would commence only after the charges are framed and the accused denies the charges. The Designated Court was, therefore, not at all justified in taking into consideration the confessional statement of Dr.Bansal for framing charges against Kalani.

9. Learned Senior Counsel has also relied on another decision of a learned single Judge of this Court reported in Mayil Vahanan v. Intelligence Officer, Narcotic Control Bureau, S.Z., Chennai ([2006] 2 MLJ (Crl.) 248), in which, the above decision of the Apex Court has been referred to and relied upon. In the said decision of this Court, the learned single Judge has observed as follows:-

> "In this case, the charge has not been framed as against the petitioner herein. The Court will have to consider as to whether there is any available material on record to frame the charge as against the petitioner. In the judgment of the Hon'ble Supreme Court referred to above, it has been categorically observed that "the Court is required to confine

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its attention only to those materials collected during the course of investigation, which can be legally translated into evidence and not open further evidence that the prosecution may adduce in the trial which would commence only after the charges are framed and the accused denies the charges."

If charges had already been framed as against the petitioner based on the incriminating materials available on record, there may not be any impediment for the prosecution to examine the co-accused, who was acquitted or convicted as the case may be to establish the guilt of the petitioner, but when the charges have not been framed against the petitioner and the petitioner has questioned the propriety of the trial Court in proposing to frame a charge without any foundation or basis, the prosecution cannot be permitted to project further evidence to be let in as a basis for framing a charge as against the petitioner.

As there is no material on record implicating the petitioner prima facie that he had committed an offence as projected by the prosecution, no charge can be framed as against him. The presumption under Section 35 of the NDPS Act, will come into play only in a case where there is some material to rope in the petitioner in the offence alleged. The Court cannot presume animus of he petitioner to commit an offence under NDPS Act, without any scrap of evidence available on record except the confession statements of the co-accused, which are found to be not legal evidence. The presumption of culpable mental state without any iota of material as against a person will be a very dangerous trend. The Court accepts the above submission made by the learned senior counsel for advocate on record for the petitioner/8th accused."

10. Per contra, the learned Special Public Prosecutor, though not questions the applicability of the ratio laid down in the above said decision to the facts of the case, submits that the petitioner has got an alternative remedy of approaching the Court below and can seek for discharge and without exhausting such an alternative remedy, it is not open to the petitioner to straight away approach this Court under Section 482 Cr.P.C. and seek for quashing of all further proceedings of the Court below. Excepting the above submission, no other submissions have been made by the respondent.

11. I have carefully considered the submissions made on either side. Admittedly, except the retracted statement of the co-accused, viz., Mahesh Deepchand Rathod (A1), there is no other material available on record as against the petitioner herein. It is also admitted that the trial of the case was split up as against the petitioner and the

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trial was conducted only in respect of Mahesh Deepchand Rathod (A1), Abdul Rasheed (A4) and Seeni Syed Ahamed (A8) and all the three accused were acquitted of all the charges and the judgment of acquittal has become final, since no appeal challenging the judgment was filed. Therefore, as per the provisions contained in Section 30 of the Indian Evidence Act, as the petitioner had admittedly not been jointly tried along with the other accused, the statement recorded from the co-accused/A.1, cannot be used as against the petitioner. If the statement of A.1 is excluded, no other material is available on record to frame charges as against the petitioner.

12. The ratio laid down by the Apex Court in Suresh Budharmal Kalani v. State of Maharashtra (AIR 1998 SC 3258), and the ratio laid down by this Court in Mayil Vahanan v. Intelligence Officer, Narcotic Control Bureau, S.Z., Chennai ([2006] 2 MLJ (Crl.) 248), squarely apply to the facts of the case. If the above said ratio is applied to the facts of the case, the contention of the learned Senior Counsel for the petitioner has to be accepted. When there is no other material available on record to frame any charge against the petitioner, if the court below is permitted to continue with the proceedings as against the petitioner, the entire proceedings will be an exercise in futility.

13. As far as the contention of the learned Special Public Prosecutor that the petitioner can approach the Court below and seek for discharge is concerned, it has to be pointed out that it cannot be a ground for rejecting the above petition filed under Section 482 Cr.P.C. Section 482 Cr.P.C. is meant for not only to prevent abuse of process of the Court, but also to secure ends of justice. When it is not the case of the prosecution that there are materials available on record, which warrant framing of any charge against the petitioner, no meaningful purpose will be served by directing the petitioner to approach the court below and seek discharge. Therefore, the said contention of the learned Special Public Prosecutor cannot be countenanced.

14. For the above said reasons, the criminal original petition is allowed and all further proceedings in C.C.No.533 of 1995 on the file of the Special Judge for NDPS Cases, Chennai, are quashed. Consequently, MP No.1 of 2007 is closed.

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Asst.Registrar

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Sub Asst.Registrar

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To

1. The Senior Intelligence officer,
   Directorate of Revenue Intelligence, Chennai.-17.

2. The Special Judge for NDPS Cases, Chennai.

3.The Special Public Prosecutor (for NDPS)
High Court, Madras.

+1cc to Mr.R.Loganathan,Advocate Sr 74078

MRD (CO)
km/5.1.

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